

11—63.9(8A) Military leave.

63.9(1) A nontemporary employee who is a member of the uniformed services, when ordered by proper authority to serve in the uniformed services, shall be granted leave. Such leave shall include a reasonable amount of time for commuting, for the period of active or inactive state or federal military service without loss of pay, benefits, seniority, or position during the first 30 days of leave. Thereafter, absences required for military service shall be in accordance with the rules on vacation, compensatory leave, or leave without pay, and 38 U.S.C. Sections 4301-4333. Military leave may be utilized for up to 30 days in any calendar year. Any amount of military leave taken during any part of an employee's scheduled workday, regardless of the number of hours actually taken, shall count as one day toward the 30 paid day maximum. Work schedule changes shall not be made for the purpose of avoiding payment for military leave.

63.9(2) A nontemporary employee who is inducted into military service may elect to be placed on leave without pay or be separated and removed from the payroll. The maximum period of accumulated time an employee can be on leave without pay or be separated from employment and still have return rights is five years.

a. The following periods shall be excluded from accumulation to determine return rights of an employee:

(1) Periods in which the employee is required, beyond five years, to complete an initial period of obligated service.

(2) Periods during which a person is unable to get orders releasing the person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of the person.

(3) Periods ordered to be performed under 10 U.S.C. Sections 270, 672(a), 672(g), 673, 673(c), and 688; 14 U.S.C. Sections 331, 332, 359, 360, 367, and 712; and 32 U.S.C. Sections 502(a) and 503.

(4) Periods ordered to or retained on active duty (other than for training) under any provision of law during a war or during a national emergency declared by the President or Congress.

(5) Periods ordered to or retained on active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under the authority of 10 U.S.C. Section 673(b).

(6) Periods ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services or called into federal service as a member of the National Guard under 10 U.S.C. Chapter 15 or under Sections 3500 or 8500.

b. The employer is not required to reemploy an individual if the individual's employment prior to military service was for a brief, nonrecurring period and there was no reasonable expectation that it would continue indefinitely; if reemployment would cause an undue hardship on the employer; if the employer's circumstances have so changed as to make such reemployment impossible or unreasonable; or if the employee has not received an honorable discharge for the employee's period of service in the uniformed services. It is the responsibility of the employer to document such "undue hardship" as well as circumstances that have changed such that reemployment is impossible or unreasonable. When requested, this documentation shall be provided to the former employee.

63.9(3) Nontemporary employees who elect to separate from employment for induction into military service shall be given 30 days of regular pay in a lump sum with their last paycheck. Any previous paid leave days granted for military service in the current calendar year shall be deducted from this 30 days.

Employees who elect to be placed on leave without pay when inducted into military service shall continue to receive regular pay and benefits for the first 30 days of leave. Any previous paid leave days granted for military service in the current calendar year shall be deducted from this 30 days.

63.9(4) The employee must notify the agency from which separated or placed on leave without pay of the intent to exercise return rights. If the service is less than 31 days (or for the purpose of taking an examination to determine fitness for service) the employee must report to the employer for reemployment at the beginning of the first full regularly scheduled working period on the first calendar day following completion of service and the expiration of eight hours after a time for safe transportation back to the

employee's residence. If reporting within that period is impossible or unreasonable through no fault of the employee, the employee shall report to work as soon as possible.

If the period of service was for 31 days or more but less than 181 days, the employee must submit an application to the employer no later than 14 calendar days following completion of service (if submitting an application is impossible or unreasonable through no fault of the employee, then the next calendar day when submission of the application is possible). For service over 180 days, the employee must submit an application with the employer no later than 90 days after completion of the service.

These time period restrictions shall be extended by up to two years if an employee is hospitalized or convalescing from an injury caused by active duty. The two-year period will be extended by the minimum time required to accommodate the circumstances beyond the individual's control which makes reporting within the time limits impossible or unreasonable.

63.9(5) The employer may request that an employee provide the employer with documentation that establishes the timeliness of the application for reemployment and the length and character of uniformed service. If documentation is unavailable, the employer must reemploy the employee until the documentation becomes available. If, after such reemployment, documentation becomes available that establishes that such person does not meet one or more of the requirements for reemployment, the employer may terminate the employment of the person.

63.9(6) An employee with fewer than 91 days of uniformed service must be reemployed promptly in a position that the employee would have attained if continuously employed, unless proved not qualified after reasonable efforts are made by the employer to qualify the employee. If not qualified for that position, the person will be reemployed in the position the person left. These requirements are the same for service of 91 days or more, with the additional option that a position of like seniority, status and pay may be offered. If unqualified after reasonable efforts by the employer to qualify the employee for such a position or the position that was left prior to service, the employee must be reemployed in any other position of lesser status and pay for which the employee is qualified, with full seniority. The position for which the employee is entitled is further governed by rule 11—63.6(8A).

An employee with a service-connected disability who is not qualified for employment in the position the employee would have attained but for military service, or in the position that was left (even after reasonable efforts by the employer to accommodate the disability) must be reemployed promptly in any other position of similar seniority, status, and pay for which qualified or would become qualified with reasonable efforts by the employer. If these efforts fail, reemployment must be in a position which is the nearest approximation consistent with the circumstances of the employee's case.

If two or more employees are entitled to reemployment in the same position or classification, the individual who left first for service in the uniformed services has the higher right to be reemployed first.

63.9(7) Upon reemployment, a person is entitled to the seniority and other benefits the individual would have attained, with reasonable certainty, had that person remained continuously employed. The employee may be required to pay the employee cost, if any, of any benefit to the extent that other employees are required to pay.

63.9(8) Any person taking military leave may use any vacation that is accrued prior to service. Upon reemployment, the employee's accrual rate for vacation shall be the same rate as if the employee had not taken military leave.

63.9(9) An employee may maintain health and dental insurance coverage while on military leave for up to 24 months. The employee is responsible for paying the employee's share of the health and dental insurance premiums if the period of military service is less than 31 days. If beyond 30 days, the employee shall be required to pay 102 percent of the full premium under the plan to maintain coverage. Upon reemployment, health and dental insurance coverage will become effective either on the first day of the month following the month the employee was reemployed or the first day of the month in which the employee was reemployed. Coverage under the plans will not have an exclusion or waiting period upon reemployment. An exclusion or waiting period may be imposed, however, in connection with any illness or injury determined by the Secretary of the U.S. Department of Veterans Affairs to have been incurred in, or aggravated during, performance of service in the uniformed services.

63.9(10) A person reemployed under this rule shall be treated as not having incurred a break in service with the employer by reason of such person's period of service in the uniformed services.

a. Retirement system. No forfeiture of benefits already accrued will be permitted, and there will be no necessity to requalify for participation in a retirement system by reason of absence for military service. To the extent required by law, employers will be required to make, on behalf of returning service members, any contributions to the members' pensions that the employer would have made if the service member had not been absent for military service. Employees will have up to three times the period of service to make up missed contributions (not to exceed five years). The employer is required to make matching contributions only to the extent that the reemployed service member makes the required employee contributions. No interest or penalty will be charged on the employee or employer contribution, nor will the employee be credited with interest that would have been earned on such contributions.

b. FMLA eligibility. In determining whether a veteran meets the FMLA eligibility requirement, the months employed and the hours that were actually worked for the state shall be combined with the months and hours that would have been worked but for the military service during the 12 months prior to the start of the leave requested.